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Paula Shapiro

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ARE WE EXECUTING MENTALLY INCOMPETENT INMATES BECAUSE THEY VOLUNTEER TO DIE?: A LOOK AT VARIOUS STATES' IMPLEMENTATION OF STANDARDS OF COMPETENCY TO WAIVE POST-CONVICTION REVIEW

Paula Shapiro⁺

More than half of all prison and jail inmates have mental health problems.¹ Since the death penalty was reinstated in 1976,² 123 death-row inmates, many of whom suffered from various mental conditions,³ were executed after they decided to waive their right to post-conviction review of their sentences.⁴ Within the legal community, these death-row

⁺ B.A. Political Science, Washington University in St. Louis; J.D. Candidate, May 2008, The Catholic University of America, Columbus School of Law. The author wishes to thank Lindsay Glauner Stallard for her invaluable guidance, advice, and expertise throughout the writing process, Matthew Mueller for his thoughtful feedback and support, and the editors and staff of the 2007-2008 *Catholic University Law Review* for their hard work. She also thanks her parents, Renie and Ross Shapiro, her brother, Barry, and the rest of her wonderful family, for their unending love, encouragement, and patience.

1. DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006). According to a Bureau Justice Statistics study released September 6, 2006, 56% of state prisoners, 45% of federal prisoners, 64% of local jail inmates have mental health problems. *Id.* at 165. The study was based on reporting of symptoms by inmates rather than through medical diagnosis. *Id.* Among state prisoners with mental problems, 43% had symptoms of mania, 23% had major depression, and 15% had psychotic disorders. *Id.* Having mental health problems was closely correlated with violence and past criminal activity. *See id.* at 7.

Other significant findings regarding those prisoners with mental problems included: 74% of those in state prison were dependent on or abusing drugs or alcohol in the year before their admission; 13% of those in state prison were homeless in the year before their incarceration; and 27% of those in state prison reported past physical or sexual abuse. *Id.*

2. *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion) (holding that executing offenders as punishment for the crime of murder does not violate the Eighth and Fourteenth Amendments in every circumstance). Four years earlier, the Supreme Court had ruled that the death penalty as it existed at the time was unconstitutional. *See Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (per curiam).

3. John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, apps. A-B (2005) (listing ninety-three volunteers who were executed between 1973 and 2003, along with their known mental illnesses and/or substance abuse disorders). Every one of the ninety-three volunteers had *at least* one mental illness or substance abuse disorder. *See id.*

4. Death Penalty Information Center, Searchable Database of Executions, <http://www.deathpenaltyinfo.org/executions.php> (follow "volunteers" under "special factors") (last visited Oct. 15, 2007). Many of these 123 volunteers waived other

inmates are commonly referred to as “volunteers,” because they voluntarily choose not to initiate or continue post-conviction proceedings, and allow or even request execution.⁵ The prevalence of mental incompetence in the criminal justice system, coupled with this volunteer phenomenon,⁶ presents a serious problem for states in ensuring that inmates who voluntarily choose to forego their post-conviction review are mentally competent not only to waive such review, but also to be executed. In order to prevent the execution of inmates who are mentally incompetent, states are being forced to adopt their own standards and guidelines to determine a volunteer’s competency to waive post-conviction relief.⁷

Twenty years ago, the United States Supreme Court, in *Ford v. Wainwright*, held that the Eighth Amendment’s bar against cruel and unusual punishment precludes the execution of insane or incompetent inmates.⁸ *Ford* gave wide discretion to the states to define the

procedural protections as well, such as the right to counsel and the right to presentation of mitigating evidence. *Id.*; see also Blume, *supra* note 3, 940 n.5.

5. Blume, *supra* note 3, at 940 n.5. The term “volunteer” also includes death-row inmates who refuse to allow their counsel to provide mitigating evidence at trial, who take affirmative steps to waive their appeals but later decide to re-initiate with post-conviction proceedings, and who simply consider the possibility of abandoning appeals. *Id.*

6. The term phenomenon refers to the fact that seventy-four of the 123 volunteer executions have occurred within the past ten-year period (1997-2006). See Death Penalty Information Center, Searchable Database of Executions, *supra* note 4.

7. See, e.g., *State v. Dawson*, 133 P.3d 236, 243 (Mont. 2006) (adopting, for the first time, a standard of competency to waive post-conviction review); see also *infra* notes 99, 100, and 103 and accompanying text.

8. *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986). Commentators have used the term “insane” and “incompetent” interchangeably to describe those inmates protected by *Ford*. See John L. Farringer IV, Note, *The Competency Conundrum: Problems Courts Have Faced in Applying Different Standards for Competency to Be Executed*, 54 VAND. L. REV. 2441, 2483 n.326 (2001) (“A dictionary of psychology defines ‘incompetence’ as ‘lacking the necessary ability or qualification properly to carry out a task,’ and state[s] that ‘[i]n psychiatric literature, *incompetence* refers to a state characteristic of insane or mentally deficient persons who, because of their deficiency, are not legally responsible.’ It also defines ‘insanity’ as ‘a serious mental disorder that renders the individual incapable of conducting his affairs in a competent manner,’ and states that ‘[i]nsanity is a legal, not a psychological term.’” (quoting J.P. CHAPLIN, DICTIONARY OF PSYCHOLOGY 224, 231 (2d ed. 1985))). Given the court system’s and mental health experts’ frequent use of the terms “competency to be executed” or “competency determinations,” the author of this Comment uses the term “competency” to refer to the mental standard that volunteers must meet in order to legally waive their rights to post-conviction relief. The term “mental illness” or “mentally ill” is used to refer to “[a]ny of various psychiatric conditions, usually characterized by impairment of an individual’s normal cognitive, emotional, or behavioral functioning, and caused by physiological or psychosocial factors.” Medical Dictionary, Definition of Mental Illness, <http://medical-dictionary.thefreedictionary.com/mental+illness> (quoting THE AMERICAN HERITAGE STEDMAN’S

competency threshold for execution and to develop the necessary procedures for competency determinations.⁹ Since *Ford*, “[e]very state that imposes the death penalty prohibits the execution of the mentally incompetent,”¹⁰ but *Ford*’s lack of structural guidance for procedures in competency determinations has resulted in numerous variations among states.¹¹ Uncertainty as to how to safeguard mentally incompetent prisoners from execution has led to a multitude of proposals for uniform regulations and laws suggesting competency determination procedures.¹²

The Eighth Amendment’s constitutional prohibition against executing the mentally incompetent, as recognized in *Ford*, demands that a competency determination occur before the execution of any death-row inmate who waives his post-conviction appeals and volunteers to be executed.¹³ States and courts have struggled to determine whether the standard of competency to waive an appeal should be identical to the competency standard for execution.¹⁴ Similar to states’ differing standards of competency to be executed, standards for determining inmate competency to waive the right to post-conviction appeals have also developed differently across the states since the first volunteer case in recent history, *Rees v. Peyton*.¹⁵ The lack of uniform and specific standards, combined with various ethical and moral issues that

MEDICAL DICTIONARY (2d ed. 2007)). The term “mental illness” is synonymous with “mental disease” or “mental disorder.” *Id.*

9. *Ford*, 477 U.S. at 427 (Powell, J., concurring in part and concurring in the judgment).

10. Bruce Ebert, *Competency to Be Executed: A Proposed Instrument to Evaluate an Inmate’s Level of Competency in Light of the Eighth Amendment Prohibition Against the Execution of the Presently Insane*, 25 LAW & PSYCHOL. REV. 29, 35 (2001).

11. See generally Gordon L. Moore III, Comment, *Ford v. Wainwright: A Coda in the Executioner’s Song*, 72 IOWA L. REV. 1461 (1987) (analyzing *Ford*’s lack of standards for minimum due process requirements in state procedures for determining insanity, and arguing for stricter standards to back up *Ford*’s basic requirements).

12. E.g., Blume, *supra* note 3, at 948-54 (discussing the “[d]ebate over [v]olunteering”); Ebert, *supra* note 10, at 35 (reciting the ABA incompetency for execution standard); Matthew T. Norman, Note, *Standards and Procedures for Determining Whether a Defendant is Competent to Make The Ultimate Choice—Death; Ohio’s New Precedent for Death Row “Volunteers”*, 13 J.L. & HEALTH 103, 119-30 (1998-1999) (reviewing various court and state competency standards).

13. See *Whitmore v. Arkansas*, 495 U.S. 149, 152-53, 165-66 (1990); *Ford*, 477 U.S. at 410-11 (plurality opinion); *Gilmore v. Utah*, 429 U.S. 1012, 1013 n.1, 1015 & n.5 (1976) (Burger, C.J., concurring); *Rees v. Peyton*, 384 U.S. 312, 313-14 (1966) (per curiam).

14. See, e.g., *State v. Dawson*, 133 P.3d 236, 243 (Mont. 2006) (adopting a version of the *Rees* competency-to-waive standard, which differed from the state’s competency-to-be-executed standard); *Singleton v. State*, 437 S.E.2d 53, 58 (S.C. 1993) (adopting the competency-to-be-executed standard as the competency-to-waive standard).

15. 384 U.S. 312 (1966).

accompany an inmate's request to die,¹⁶ creates gaps in the system that increase the chance that a mentally incompetent inmate will be executed unlawfully.¹⁷

Putting aside the issue of the possible inadequacy of states' standards to determine competency to be executed and competency to waive appeals,¹⁸ this Comment examines four states' adoption and implementation of procedures for determining an inmate's competency to waive his state post-conviction review. This Comment focuses on the four states in which a volunteer was executed in 2006—Montana, Nevada, Ohio, and South Carolina¹⁹—and analyzes the procedures used

16. The volunteer phenomenon has raised a number of questions that have plagued scholars since the *Rees* decision in 1966. Scholars have debated the ethical and moral problems regarding the responsibilities of lawyers who represent death-row volunteers, the inability of courts to create a thorough competency standard that encompasses sufficient procedural safeguards, and the possible mental illness or suicidal motivations underlying the decision among some death-row inmates to choose execution. See Blume, *supra* note 3, at 942; Ebert, *supra* note 10, at 31-32 (arguing that the competency-to-be-executed standard is inadequate and offering a proposed instrument as a solution); Richard W. Garnett, *Sectarian Reflections on Lawyers' Ethics and Death Row Volunteers*, 77 NOTRE DAME L. REV. 795, 798 & n.15 (2002) (citing articles).

17. For example, in North Carolina, Guy LeGrande was scheduled to be executed on December 1, 2006. Death Penalty Information Center, Clemency Urged for Mentally Ill Man in North Carolina, <http://www.deathpenaltyinfo.org/article.php?did=1938> (last visited Oct. 26, 2007). LeGrande, a severely mentally ill man, was allowed to "represent" himself at trial and to waive state post-conviction proceedings,

despite the fact that he claimed to be hearing messages from Oprah Winfrey and Dan Rather through television sets. His defense lawyer, Jay Ferguson, said LeGrande falsely believes he has already been pardoned and will receive a large sum of money. "The problem is you have a mentally ill person representing himself," Ferguson said. "When his standby counsel asked the court to review his mental competency, the judge asked the defendant if he wanted to do that and he said no. His response was to tear up the paperwork. So you've got a mentally ill defendant making the call on whether his competency should be examined."

Id. LeGrande has recently been diagnosed with a delusional disorder with grandiose and persecutory delusions. See *LeGrande v. Lee*, No. 1:99CV00314, 2005 WL 1869223, at *7-10 (M.D.N.C. Aug. 5, 2005). As of March 2008, LeGrande has not been executed and legal wrangling about the definition of competency and mental illness continues. This case illustrates the need for uniform requirements in volunteer cases to protect against an incompetent or mentally ill inmate making legal decisions that a neutral court should be determining.

18. A discussion of the insufficiencies within the legal definition of competency is beyond the scope of this Comment.

19. *Dawson*, 133 P.3d at 243 (adopting a standard of competency to waive post-conviction review and finding that David Dawson was competent based on that standard); *Mack v. State*, 75 P.3d 803, 804 (Nev. 2003) (per curiam) (finding Darryl Linnie Mack competent to waive post-conviction review); *State v. Ferguson*, 844 N.E.2d 806, 817 (Ohio 2006) (finding that based on testing prior to and during trial, Darrell W. Ferguson was competent to waive post-conviction review and be executed); *State v. Barton*, 844 N.E.2d

to determine whether the volunteer met each state's standard of competency to waive prior to execution.²⁰ This Comment further examines the state appeal procedures used to determine whether the state courts based such decisions on non-arbitrary and sufficient evidence. Twenty years after the *Ford* Court held that certain due process safeguards are required before the execution of possibly incompetent death-row inmates,²¹ questions and problems still remain.

307, 317 (Ohio 2006) (holding that Rocky Barton did not show an indicia of incompetency to waive post-conviction review, and was competent to waive and be executed); *State v. Downs*, 631 S.E.2d 79, 80-81 (S.C. 2006) (holding that under the *Singleton* standard William E. Downs, Jr. was competent to waive his post-conviction review).

20. However, a look at the courts' implementation of competency determinations in 2006 cases where the courts have stayed a "volunteer's" execution is beyond the scope of this Comment.

The two 2006 volunteers for whom the courts have decided to stay executions are Daryl Keith Holton and Elijah Page. For information on Holton, see *Holton v. State*, 201 S.W.3d 626 (Tenn. 2006); *Holton v. Bell*, No. 1:05-cv-202, 2006 U.S. Dist. LEXIS 67992 (E.D. Tenn. Sept. 21, 2006). For information on Page, see *State v. Page*, 709 N.W.2d 739 (S.D. 2006). For a recent look at Florida's implementation of competency determinations, see L. Elizabeth Chamblee, Comment, *Time for a Legislative Change: Florida's Stagnant Standard Governing Competency for Execution*, 31 FLA. ST. U. L. REV. 335 (2004).

21. *Ford v. Wainwright*, 477 U.S. 399, 411-12 (1986) (plurality opinion); see also *infra* notes 26-30 and accompanying text.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (ADEPA), even after a state court has issued a "final" decision on the competency of an inmate to waive his or her post-conviction appeals or to be executed, a federal district court is required to hold an additional evidentiary hearing on competency if the sufficiency of the state court proceedings, under a presumption of correctness, do not meet specific factors set forth in the statute. See 28 U.S.C. § 2254(e)(1) (2000) (stating that "a determination of a factual issue made by a State court shall be presumed to be correct"). ADEPA actually heightened the requirement for federal habeas review of state court determinations, making this safeguard less effective. See, e.g., Symposium, *The Death Penalty Experiment: The Facts Behind the Conclusions*, 29 U. DAYTON L. REV. 223, 228 (2004) ("[The ADEPA] heightened many of the requirements for filing and granting federal habeas corpus petitions. Specifically, the Act mandates that habeas claims must be denied unless the state court unreasonably applied federal law. Therefore, the Act will likely decrease the number of overturned death sentences." (footnotes omitted)).

The statutory safeguard of federal review of state court habeas corpus determinations arguably reduces the probability that incompetent inmates will be executed. The existence of additional safeguards, including federal review, between the state supreme court's determination of competency to waive post-conviction review and the actual execution of the "volunteer" does not, however, render the state procedures sufficient to capture incompetence. See *Herrera v. Collins*, 506 U.S. 390, 400-01 (1993) (explaining that federal habeas corpus was not intended to correct errors at the state level). It is not an excuse for states not to fix their relevant laws or systems simply because the federal courts will inspect the decisions. See *id.* One argument in favor of states disregarding federal government checks is that it is a waste of money and resources, not to mention unfair to the inmate who is forced to go through an additional appeal process while awaiting execution. However, states should not have an inferior process of ensuring that

Part I of this Comment presents the developments leading up to the current case law regarding the execution of incompetent inmates. A review of the Supreme Court's identification of due process problems in *Ford*, and of psychiatric evaluation problems in the 2002 case *Atkins v. Virginia*,²² illuminates the Court's approach to the competency determination of volunteers. Part I then examines the four states' standards of competency to waive post-conviction review and the procedural requirements in place to make such determinations. Finally, Part I identifies the five 2006 volunteer executions and briefly recounts the factual and procedural history of the cases.

In light of these states' standards and procedures, and based on legal literature proposing model legislation or instruments to determine competency, Part II first suggests five basic procedural requirements that should be uniformly adopted by all states in order to ensure the adequacy of standards used to determine competency to waive post-conviction review. Part II then examines the 2006 volunteer executions to determine whether the states implemented these five basic requirements to ensure that incompetent inmates are not being executed because they volunteer to die.

Part III discusses the discrepancies affecting the states' implementation of standards to evaluate competency to waive post-conviction proceedings, and also highlights some states that have implemented standards and procedures that seem to effectively safeguard an incompetent inmate's interests. Part III then addresses the reasons why lack of uniformity in state determinations of competency to waive post-conviction review increases the likelihood that the incompetent will be executed. Part III concludes that explicit requirements delineating specific procedures for waiving post-conviction review and determining competency to waive must be adopted and implemented in order to safeguard the incompetent inmate's rights.

I. DEVELOPMENT OF CURRENT STANDARDS TO DETERMINE DEATH-ROW INMATES' COMPETENCY TO WAIVE POST-CONVICTION APPEALS

A. *The Historical Context of Capital Punishment and Incompetence*

In the 1986 case *Ford v. Wainwright*, the Supreme Court held that executing a mentally incompetent inmate was constitutionally

incompetent individuals are not being executed just because there is an additional federal protection in place; state executions should include sufficient state procedures. *See id.*

22. 536 U.S. 304 (2002).

impermissible.²³ In an expansive reading of the Constitution, the Court held that the execution of the incompetent constitutes cruel and unusual punishment as prohibited by the Eighth Amendment.²⁴ A plurality of the *Ford* Court further addressed the limited issue of whether Florida's statutory procedures to determine an inmate's competency to be executed violated a defendant's procedural due process rights.²⁵ The plurality identified three baseline requirements that must be conducted in all cases for the procedures determining competency to be executed. First, at a minimum, the condemned or his counsel must be allowed to present relevant material so the fact-finder can make an informed decision.²⁶ Second, the condemned or his counsel must be allowed the "opportunity to challenge or impeach the state-appointed psychiatrists' opinions."²⁷ Third, in order for the determination to be reliable, the final decision must not be left solely to the executive branch.²⁸ However, rather than specify the procedures necessary for a complete determination, the Court simply noted the deficiencies in Florida's procedures,²⁹ leaving to the states "the task of developing appropriate ways to enforce the constitutional restriction" on executing incompetent inmates and to meet the aforementioned basic requirements.³⁰

Although the Court did not address the sufficiency of Florida's definition of competency, Justice Powell discussed it in his concurring

23. See *Ford*, 477 U.S. at 401 (observing that although all jurisdictions have forbidden the execution of the insane for centuries, the Supreme Court had yet to specifically prohibit the practice).

24. See *id.* at 409-10.

25. *Id.* at 410-11.

26. *Id.* at 414.

27. *Id.* at 415.

28. *Id.* at 416.

29. *Id.* The plurality found that one defect in Florida's procedures was the "failure to include the prisoner in the truth-seeking process." *Id.* at 413. Any procedure that precludes the prisoner or his or her counsel from presenting material relevant to his or her sanity, or bars consideration of that material, deprives the factfinder of "the substantial benefit of potentially probative information." See *id.* at 414. Another procedural deficiency was "the denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions," which "create[d] a significant possibility that the ultimate decision made in reliance on those experts will be distorted." *Id.* at 415. Arguably, "the most striking defect" in the Florida procedure was that the executive branch had the sole decision-making power. *Id.* at 416. It is the Governor "who appoints the experts and ultimately decides whether the State will be able to carry out the [death] sentence . . . , [and] whose subordinates have been responsible for initiating every stage of the prosecution The [Governor] cannot be said to have the neutrality that is necessary for reliability in the factfinding proceedings." *Id.*

30. *Id.* at 416-17; see also *id.* at 427 (Powell, J., concurring) (arguing that, aside from basic due process requirements, "[s]tates should have substantial leeway to determine what process best balances the various interests at stake").

opinion.³¹ His widely-accepted concurrence created a low constitutional threshold to be used in determining whether a death-row inmate is competent to be executed.³² In Justice Powell's view, "the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."³³ For the states to create procedures to meet this standard, Justice Powell suggested that the majority's "heightened procedural requirements" are unnecessary for a determination of competency to be executed.³⁴ In fact, he indicated that all that is needed to ensure due process is a hearing "far less formal than a trial," conducted by an impartial state officer or board that would hear and receive both prosecution and defense evidence.³⁵ Such evidence, according to Justice Powell, could include expert psychiatric testimony from both the state and defense, as well as argument from prisoner's counsel.³⁶ Ultimately, the Court agreed on the inapplicability of the major justifications for capital punishment where incompetent inmates are concerned, such as its deterrent and retributive forces, because in order to be effective, those justifications require inmates' "awareness of the penalty's existence and purpose."³⁷ As a result, the Court found that the execution of the mentally incompetent constitutes cruel and unusual punishment in violation of the Eighth Amendment.³⁸

In light of the constitutional prohibition against executing the mentally incompetent, the Supreme Court in 1989 held that the Eighth Amendment's prohibition did not categorically exclude the execution of criminals with mental retardation.³⁹ However in 2002 the Court reversed

31. *Id.* at 421-22 (Powell, J., concurring).

32. Donald P. Judges, *The Role of Mental Health Professionals in Capital Punishment: An Exercise in Moral Disengagement*, 41 HOUS. L. REV. 515, 534 (2004) (discussing Justice Powell's concurrence that gave the majority the necessary fifth vote for its decision in *Ford*); see, e.g., *Johnson v. Cabana*, 818 F.2d 333, 337 (5th Cir. 1987) (*per curiam*) (adopting Justice Powell's standard as the constitutional minimum).

33. *Ford*, 477 U.S. at 422 (Powell, J., concurring).

34. *Id.* at 425 (explaining that a "full-scale 'sanity trial'" is unnecessary in light of the flexibility of the due process doctrine, and that the necessary requirements will depend on the situation).

35. *Id.* at 427.

36. *Id.*

37. See *id.* at 421 (discussing the lack of retributive value to executing the insane).

38. *Id.* at 407-08 (Marshall, J.); *id.* at 421 (Powell, J., concurring).

39. *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989). In this case, Johnny Paul Penry, a twenty-two year old retarded man with the mental age of a six and one-half year old, was convicted of murder and sentenced to death. *Id.* at 307-08. Penry was found competent to stand trial based partly on the testimony of two state psychiatrists who diagnosed Penry with an antisocial personality disorder. *Id.* at 308-09. During the trial proceedings, the jury was not instructed that it could consider the mitigating circumstances of Penry's

its position on mental retardation and held, six to three in *Atkins v. Virginia*, that the application of the death penalty to defendants with mental retardation is per se unconstitutional.⁴⁰ The *Atkins* Court reasoned that although mentally retarded persons may know the difference between right and wrong and may seem competent to stand trial, they have diminished abilities in reasoning, judgment, and impulse control.⁴¹ Accordingly, the Court found that these persons are less culpable.⁴² These same characteristics apply to incompetent inmates.⁴³

In *Atkins*, the Court once again offered states minimal guidance regarding specific procedures that should be used to determine mental competency in order to prevent the unconstitutional execution of mentally retarded offenders.⁴⁴ The Court did, however, demonstrate the contrast between the thoroughness of the state and defense experts' competency evaluations.⁴⁵ The defense's forensic psychologist, who testified that Atkins was "mildly mentally retarded," interviewed Atkins,

mental retardation in imposing its sentence. *Id.* at 307. In an opinion determining whether Penry's sentence constituted cruel and unusual punishment, Justice O'Connor argued that the jury was improperly instructed and should have been able to consider Penry's mental deficiencies when imposing its sentence. *Id.* at 303, 340. However, she rejected Penry's blanket claim that generally the Eighth Amendment does not allow death sentences for retarded defendants. *See id.* at 340.

40. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

41. *Id.* at 318 (noting that mentally retarded persons "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others").

42. *Id.* at 318. The *Atkins* Court also found, similar to the *Ford* Court, that this lesser culpability effectively eliminates the applicability of the retributive and deterrent purposes justifying capital punishment and creating an increasing likelihood of "wrongful execution." *See id.* at 318-21 (reasoning that mentally retarded defendants "face a special risk of wrongful execution" because they "may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes"). Another reason the Court retreated from *Penry* was because of the prevalence nationwide of legislation prohibiting such executions and the infrequency of the executions in states that allow mentally retarded offenders to be executed. *Id.* at 314-16. The Court also noted that polling data showed that the world community and many Americans were against executions of mentally retarded offenders. *Id.* at 316 n.21. Finally, the Court found persuasive that the mentally retarded are more likely to make false confessions and less likely to convince a jury that it should consider mitigating factors. *See id.* at 320-21.

43. *Compare id.* at 320, with *Rees v. Peyton*, 384 U.S. 312, 314 (1966) (per curiam) (explaining that if an inmate fails to understand information about his position, or lacks "capacity to appreciate his position," then he should be found incompetent).

44. *Atkins*, 536 U.S. at 317 ("As was our approach in *Ford v. Wainwright*, with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)) (internal citation omitted)).

45. *Id.* at 308-09.

members of his family, and deputies at the jail where Atkins had been incarcerated for eighteen months prior. He also reviewed school, court, and investigative records, including Atkins' statements to police, and administered a standard intelligence test, which indicated Atkins' IQ was 59.⁴⁶ In contrast, the states' expert, who determined that Atkins was not mentally retarded and testified that Atkins had an antisocial personality disorder with an "average intelligence, at least," based his testimony on a much less thorough evaluation.⁴⁷ His testimony was based only upon "two interviews with Atkins, a review of his school records, and interviews with correctional staff."⁴⁸ Although specifically relating to mental retardation and making virtually no mention of standards of competency to be executed or waive appeals, this reasoning provides insight into the Court's attitude toward mental evaluations generally.

B. The Development of the Standards of Competency to Waive Post-Conviction Appeals

Ford and *Atkins* only provide an indication as to what the Supreme Court considers important in terms of the evaluations and standards for competency to waive post-conviction appeals. The following cases, however, offer concrete evidence of the Court's jurisprudence in the area of inmate competency to waive post-conviction relief and volunteer for execution.

In 1966, in *Rees v. Peyton*, defendant Melvin Davis Rees, Jr. sought to withdraw his post-conviction appeal.⁴⁹ After Rees' counsel offered evidence and presented the testimony of a psychiatrist who concluded that Rees was mentally incompetent, the Supreme Court ordered a judicial competency evaluation of Rees.⁵⁰ The Court instructed the lower court to determine whether the prisoner had the "capacity to appreciate

46. *Id.* at 308-09 & n.4. Dr. Nelson, the defense psychologist, administered the United States' standard intellectual functioning assessment, the Wechsler Adult Intelligence Scales test (WAS-III), which scores from 45-155. *Id.* at 309 n.5. A score of 100 is considered average cognitive functioning, whereas a score between 70 and 75 is considered the cutoff for a finding of mental retardation. *Id.*

47. *Id.* at 309 & n.6.

48. *Id.*

49. *Rees v. Peyton*, 384 U.S. 312, 313 (1966) (per curiam). Rees was sentenced to death for murder by a Virginia state court in 1961, and his sentence was affirmed on appeal in 1962. *Id.* at 312-13. A month after petitioning the Supreme Court for certiorari, Rees directed his attorney to withdraw the petition and waive his remaining appeals. *Id.* at 313. Rees' attorney told the Court "he could not conscientiously accede to these instructions without a psychiatric evaluation of Rees because evidence cast doubt on Rees' mental competency," and after further conversations among Rees, his attorney, and the Court, Rees' attorney had him evaluated by a psychiatrist who concluded that Rees was indeed mentally incompetent. *Id.*

50. *Id.* at 313-14.

his position and make a rational choice with respect to continuing or abandoning further litigation,” or “whether he [wa]s suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.”⁵¹

Following *Rees*, courts had trouble applying this two-prong test.⁵² For this reason, the United States Court of Appeals for the Fifth Circuit, in *Rumbaugh v. Procnier*, modified the *Rees* standard into a three-part competence inquiry.⁵³ First, the court asked, does the condemned have a mental disorder? Next, if the condemned is suffering from a mental disorder or defect, does this condition prevent him from understanding his legal position and his available options? Finally, if the condemned is suffering from a mental disorder but his understanding is unimpaired, does the condition nonetheless prevent the condemned from rationally choosing among his options?⁵⁴

In *Rumbaugh*, the Fifth Circuit affirmed the decision of the United States District Court for the Northern District of Texas to deny a “next friend” petition⁵⁵ on behalf of volunteer Charles Rumbaugh, where the district court determined that he possessed the requisite mental competence to waive his right to post-conviction review.⁵⁶ The Fifth Circuit upheld the constitutionality of the waiver, reasoning that despite Rumbaugh’s severe depression and mental illness, the district court’s finding of his competency to waive met the stated competency standard.⁵⁷ Since *Rumbaugh*, other states have subsequently embraced this revision

51. *Id.* at 314.

52. *See, e.g.*, *Hauser v. Moore*, 223 F.3d 1316, 1322 (11th Cir. 2000) (per curiam); *Rumbaugh v. Procnier*, 753 F.2d 395, 398-99 (5th Cir. 1985); *see also* Norman, *supra* note 12, at 122-23 (discussing the Fifth Circuit’s attempt to modify the *Rees* standard “into a more manageable inquiry”). A court may determine that a prisoner has a mental disorder that affects his or her decision-making, and simultaneously that he or she nonetheless has the ability to appreciate his or her position, and can make a “rational” choice. *Id.* Therefore, in *Rumbaugh*, the Fifth Circuit tried to explain the confusing vocabulary used in *Rees* by breaking down the first prong into a more workable three-prong analysis. *Rumbaugh*, 753 F.2d at 398. The dissent described the confusion over the term “rationality” as “one of the most vexing and debated questions of contemporary philosophy, [and] this black hole makes the *Rees* standard of competency far from self-evident.” *Id.* at 404 n.2 (Goldberg, J., dissenting) (citation omitted).

53. *Rumbaugh*, 753 F.2d at 398.

54. *Id.*

55. A “next friend” petition is filed by “[a] person who appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff, but who is not a party to the lawsuit and is not appointed as a guardian.” BLACK’S LAW DICTIONARY 1070 (8th ed. 2004).

56. *Rumbaugh*, 753 F.2d at 398.

57. *Id.* at 402-03.

of the *Rees* standard when determining an inmate's competency to waive his post-conviction review.⁵⁸

In *Gilmore v. Utah*, the Supreme Court implicitly accepted a standard of competency described as "a knowing and intelligent waiver."⁵⁹ After reviewing the records concerning Gilmore's competency proceedings, the Court upheld the Utah Supreme Court's finding that he was competent to waive his appeals.⁶⁰ Concurring, Chief Justice Burger opined that Gilmore's mother did not possess next friend standing to assert that her son was competent, and thus rejected a potential additional safeguard against executing Gilmore.⁶¹ The strong dissent by Justice Marshall emphasized the injustice of carrying out the sentence so quickly, thereby preventing sufficient time for a "mature consideration" of Gilmore's competency.⁶² Justice White's dissent also argued that a volunteer cannot consent to be executed and thereby render constitutional an otherwise unconstitutional punishment.⁶³

58. See, e.g., *In re Cockrum*, 867 F. Supp. 484, 485 (E.D. Tex. 1994), *rev'd on other grounds*, 119 F.3d 297 (5th Cir. 1997); cf. Norman, *supra* note 12, at 121-22 (stating that because the United States Supreme Court has not indicated which approach it adopts, the Court has "left the states with a confusing and conflicting line of cases concerning the standard to determine a defendant's competency to waive death penalty appeals").

59. 429 U.S. 1012, 1013 (1976) (No. A-453) (miscellaneous order). Gary Gilmore was convicted of murder and sentenced to death after a trial in Utah on October 7, 1976. *Id.* at 1012. His mother, Bessie Gilmore, filed a next friend petition on December 2, 1976, to stay an execution scheduled for four days later. *Id.* at 1013 (Burger, C.J., concurring). On December 8, Gary Gilmore filed a response challenging his mother's standing to act on his behalf. *Id.* at 1013-14. The case was unique because Gilmore did not request relief, but instead had "expressly and repeatedly stated since his conviction in the Utah courts that he had received a fair trial and had been well treated by the Utah authorities." *Id.* at 1013 n.1. Further, Gilmore's only complaint "ha[d] been with respect to the delay on the part of the State in carrying out the sentence." *Id.*

60. *Id.* at 1013 (miscellaneous order); see also Norman, *supra* note 12, at 119-20 (noting that the Court found Gilmore competent to waive his post-conviction review "without even making reference to the 'Rees Standard'").

61. *Gilmore*, 429 U.S. at 1014 (Burger, C.J., concurring). In doing so, the Court determined that third parties do not have standing to litigate claims on an inmate's behalf if the condemned inmate is deemed competent to make his own decisions. See *id.* at 1013 (miscellaneous order).

62. *Id.* at 1019 (Marshall, J., dissenting) (lamenting that Gilmore was scheduled to be executed a mere five months after the crime and two months after sentencing, and noting that this was "hardly sufficient time for mature consideration of the question [of Gilmore's competence], nor d[id] Gilmore's erratic behavior—from his suicide attempt to his state habeas petition—evidence such deliberation").

63. *Id.* at 1018 (White, J., dissenting) ("[T]he consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment."). The concerns of the *Gilmore* dissenters foreshadow Justice Marshall's 1986 holding in *Ford*, which interpreted the Eighth Amendment's prohibition of cruel and unusual punishment as banning the execution of the mentally incompetent. See *id.*; *id.* at 1019 (Marshall, J., dissenting). Both Justices addressed the complexity of the

In *Whitmore v. Arkansas*, Jonas Whitmore sought to prevent the execution of a fellow death-row inmate, Ronald Simmons, by filing a next friend petition challenging Simmons's competency.⁶⁴ The Court held that to have next friend standing, a third party must show that "the real party in interest is unable to litigate his own cause due to mental incapacity"; this requirement is not met when an evidentiary hearing establishes that the inmate gave a "knowing, intelligent, and voluntary" waiver and that he had proper access to the courts.⁶⁵ Accordingly, the Supreme Court found that to be valid, a waiver of an inmate's right to pursue post-conviction proceedings must be knowing, intelligent, and voluntary.⁶⁶

In *Demosthenes v. Baal*, the Court reversed a Ninth Circuit decision to grant a petition for stay of execution filed by Baal's parents.⁶⁷ The circuit court reasoned that the petition offered a minimal basis for granting an evidentiary hearing to determine Baal's competency to waive his post-conviction right for review, and remanded the case for further proceedings.⁶⁸ The Court's decision implicitly held it sufficient to base a

nexus between waiver of the right to assert post-conviction appeals and the constitutional ban on executing mentally incompetent inmates. *Id.* at 1019 (Marshall, J., dissenting) ("I fully agree with my Brother White that a criminal defendant has no power to agree to be executed under an unconstitutional statute."). Justice Marshall also took exception to the fact that no adversarial hearing had been held to rebut the state-employed prison psychiatrist's sole opinion on Gilmore's competency to waive, which was based on a one hour evaluation and a review of Gilmore's records. *Id.*

64. *Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990).

65. *Id.* at 165.

66. *Id.*

67. *Demosthenes v. Baal*, 495 U.S. 731, 733-34, 737 (1990) (per curiam) (holding that a state court's determination of competency to waive post-conviction review is binding on a federal court hearing a habeas corpus petition, and because Baal's parents failed to establish that he was not competent to waive further proceedings, the federal court lacked jurisdiction to consider the petition).

Thomas E. Baal was convicted of first degree murder and robbery with use of a deadly weapon by a Nevada court and sentenced to death. *Id.* at 732. Prior to Baal's pleading not guilty and not guilty by reason of insanity, "two psychiatrists examined Baal and found that Baal was competent to stand trial, able to understand right from wrong at the time of the alleged offense, and disturbed but not psychotic." *Id.* In an evaluation conducted after his arraignment and pleading, a third psychiatrist found him competent to stand trial. *Id.* When Baal chose to forego his remaining appeals, the state post-conviction court held an evidentiary hearing where Baal and a psychiatrist testified to his competency, and based on that evidence, the court determined Baal intelligently waived his right to post-conviction relief. *Id.* at 732-33. Baal's parents filed a next friend petition for federal habeas corpus relief a week later, just hours before Baal's scheduled execution. *Id.* at 733.

68. *Id.* at 734. The Supreme Court held that the district court had correctly affirmed the Nevada Supreme Court's conclusion on Baal's competency to waive, and explicitly noted that the determination was "fairly supported by the record," and thus binding on a federal habeas court. *Id.* at 735 (stating that "under [the] presumption of correctness, the state court's factual finding as to Baal's competence is binding on a federal habeas court");

competency-to-waive determination on the testimony of a psychiatrist who observed the inmate and testified to competency, the determination of three other psychiatrists as to competency, and the trial court's conclusion of competency following extensive questioning and observations of the inmate.⁶⁹ Additionally, the Court explicitly adopted the "knowing, intelligent, and voluntary waiver of his right to proceed" formula as the competency-to-waive standard.⁷⁰ The *Baal* holding is the latest effort by the Supreme Court to develop and expound a specific competency standard.⁷¹

see also *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (discussing when a federal evidentiary hearing is required).

69. *Baal*, 495 U.S. at 735.

70. *Id.* at 734 (quoting *Whitmore*, 495 U.S. at 165).

71. Also in 1990, the Supreme Court passed on the opportunity to identify constitutional standards for procedures to determine a volunteer's competency to waive the post-conviction process. See *Hamilton ex rel. Smith v. Texas*, 497 U.S. 1016, 1016 (1990) (No. A-917) (Brennan, J., dissenting). Four members of the Court would have granted certiorari, but petition was denied because five votes are required to grant a stay. *Id.* at 1016-17. Justices Brennan and Marshall strongly disagreed with the denial of certiorari, noting the importance to both state and federal courts of articulating specific procedures for determining competency to waive post-conviction review. *Id.* at 1019. Justice Brennan asserted that he "believe[d] that we shirk our responsibility if we do not articulate standards by which the adequacy of procedures in state competency hearings may be judged." *Id.* at 1016.

Three years later in *Godinez v. Moran*, the Supreme Court, through Justice Thomas, decided that the standard of competency for pleading guilty or for waiving the right to counsel is the same as the standard of competency for standing trial. 509 U.S. 389, 391. The Court held that although states may choose to adopt a more complex competency standard, all that the Due Process Clause requires is that the defendant "has the capacity to understand the proceedings and to assist counsel." *Id.* at 402. This formulation was derived from *Dusky v. United States*, in which the Court held that the determination of competency to stand trial cannot be predicated upon a finding that the defendant is "oriented to time and place and [has] some recollection of events," but instead the question is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." 362 U.S. 402, 402 (1960) (per curiam). In *Dusky*, the Court remanded the case to the district court for a new hearing on the defendant's competency to stand trial based on the "doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago." *Id.* at 403.

The Court's adoption of the *Dusky* standard in *Moran* implies that for an inmate to meet the basic competency standard, he or she must simply have the capacity to understand the proceedings against him or her and to assist and consult with counsel. See *Moran*, 509 U.S. at 402. While not specifically addressing the standard of competency to waive post-conviction review, the Court, in dicta, acknowledged this waiver, indicating that it saw no difference between the standards of competency. *Id.* at 398 n.9 (noting that the Court has "used the phrase 'rational choice' in describing the competence necessary to withdraw a certiorari petition, but there is no indication . . . that the phrase means

C. States' Competency Standards and Specific Procedural Requirements to Meet Competency Standards

The Supreme Court rulings discussed above have provided states with a variety of verbiage from which to craft competency standards and procedural requirements for such determinations.⁷² States were left the option to adopt the wording of *Whitmore*, *Rees*, or *Rumbaugh*, or a variation of their own, with the only obligation being to meet the very basic due process procedural requirements set forth in *Ford*.⁷³ Below is a

something different from 'rational understanding'" (citing *Rees v. Peyton*, 384 U.S. 312, 314 (1966) (per curiam))).

72. See *Ford*, 477 U.S. at 427 (Powell, J., concurring) (stating that the states should be allowed "substantial leeway" to develop their own standards).

73. See *Whitmore*, 495 U.S. 149; *Rees*, 384 U.S. 312; *Rumbaugh v. Procunier*, 753 F.2d 395 (5th Cir. 1985); see also Norman, *supra* note 12, at 122 ("The states have been left to choose which standard they consider is best, or to create their own.").

Courts may also adopt other versions of competency standards and procedures. For example, the American Bar Association (ABA) offers its own standard for incompetence to be executed, as well as procedures to use upon an initial showing of incompetence:

A convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. A convict is also incompetent if, as a result of mental illness of [sic] mental retardation, the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE 7-5.6 (2d ed. 1989) [hereinafter STANDARDS FOR CRIMINAL JUSTICE]. The ABA Standards are persuasive and frequently cited, though they are not binding. Farringer, *supra* note 8, at 2452 n.78.

Additionally, the recent ABA Mental Disability Task Force Recommendations urge states to adopt its model legislation, which would preclude the execution of an inmate with a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forgo or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case.

Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty, 54 CATH. U. L. REV. 1115, 1115 (2005).

The ABA's report, which accompanies the Recommendation, also offers the following qualification regarding the adoption of procedures designed for incompetent prisoners:

While this [procedure] contemplates that hearings will have to be held to determine competency to proceed and competency to be executed, it does not make any recommendations with respect to procedures. Federal constitutional principles and state law will govern whether the necessary decisions must be made by a judge or a jury, what burdens and standards of proof apply, and the

brief explanation of the competency standards and specific procedural requirements of each of the four states in which a volunteer was executed in 2006.

1. Montana

Until recently, the Montana Supreme Court had yet to articulate a standard to determine whether a volunteer has the requisite mental competency to waive his right to post-conviction review.⁷⁴ On April 11, 2006, in *State v. Dawson*, the Montana Supreme Court adopted the United States Supreme Court's *Rees* standard for competency to waive.⁷⁵ In adopting the *Rees* standard, the Montana Supreme Court explicitly found that the test comported with the state constitution.⁷⁶ In addition to a finding of competency under the *Rees* standard, the court held that a separate determination of whether the inmate's waiver was voluntary is required.⁷⁷ The court suggested that conditions of imprisonment may render an inmate's decision involuntary by causing him to "abandon his desire to live."⁷⁸

The Montana Supreme Court also developed certain legal procedures that would be required in making competency and voluntariness determinations⁷⁹ by referencing the procedures used by the Ninth Circuit in *Dennis v. Budge*.⁸⁰ The Montana Supreme Court acknowledged that the lower courts, in holding the required evidentiary hearing, have the discretion to "gather such information and conduct such proceedings as

scope of other rights to be accorded offenders. Additionally, in any proceedings necessary to make these determinations, the victim's next-of-kin should be accorded rights recognized by law, which may include the right to be present during the proceedings, the right to be heard, and the right to confer with the government's attorney.

Paul M. Igasaki et al., *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668, 676-77 (2006).

74. *State v. Dawson*, 133 P.3d 236, 243 (Mont. 2006).

75. *Id.*; see also discussion *infra* Part I.D.1. The Montana Supreme Court clarified the *Rees* standard by citing to the *Rumbaugh* three-prong analysis. *Dawson*, 133 P.3d at 243.

76. *Dawson*, 133 P.3d at 243 (noting that the standard is "understandable").

77. *Id.* at 247 (citing *Comer v. Stewart*, 215 F.3d 910, 917 (9th Cir. 2000)). The Montana court defined voluntary as being "fully aware of the direct consequences [of waiver], including the actual value of any commitments made to [the defendant] by the court, prosecutor, or his own counsel," and that the waiver must "not [have been] induced by threats or promises to discontinue improper harassment, misrepresentation, or improper inducements." *Id.* (citing *Duffy v. State*, 120 P.3d 398 (2005)).

78. *Id.* (quoting *Comer*, 215 F.3d at 918).

79. *Id.* at 243-44, 247. The questions of competency and voluntariness, while separate questions, can be evaluated in the same evidentiary hearings or procedures. See *id.* at 244.

80. *Id.* at 243 (citing *Dennis v. Budge*, 378 F.3d 880, 889 (9th Cir. 2004)). In *Dennis*, the volunteer had a history of mental illness and suicide attempts, but was still found competent to waive his post-conviction relief. *Dennis*, 378 F.3d at 882.

[would be] necessary and lawful to make the required determinations.”⁸¹ In its *Dawson* decision, the state supreme court implicitly mandated that a court-appointed psychiatrist examine the inmate, review his records, interview counsel, and prepare a report for the court.⁸² Additionally the court found that while a hearing with the inmate present is required, the psychiatrist is not required to testify, and there is no Montana or federal law that entitles defense attorneys to cross-examine the state’s psychiatrist witnesses.⁸³ The court also recognized the importance in engaging in discussions with the inmate himself during the hearing as well as reviewing his medical reports.⁸⁴

2. Nevada

In a 1998 volunteer case, the Nevada Supreme Court adopted the *Rees* standard as its own standard to determine competency to waive post-conviction review.⁸⁵ The court held that to decide whether a death-row inmate is competent to forego his remaining post-conviction appeals and volunteer to be executed, it must be determined that the volunteer “‘has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation, or alternatively whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.’”⁸⁶ The court further stated that “[a] condemned person is sane if ‘aware of his impending execution and of the reason for it.’”⁸⁷

The court also held that procedurally, a state trial court is required to hold a competency hearing to resolve conflicting evidence and make

81. *Dawson*, 133 P.3d at 244 (reasoning that a lower court judge has the “opportunity to observe and question a prisoner [and] is not constrained by the cold record and is often in the best position to judge competency”).

82. *See id.* at 239, 243-44. Although it was the district court that appointed the psychiatrist, the Montana Supreme Court found this procedure sufficient. *See id.*

83. *Id.* at 249 (“There is no requirement under Montana or federal law that an expert who submits a written report must testify at a hearing to determine a prisoner’s competency in order to make that proceeding adequate.”). The court refused to extend the application of a Montana statute entitling defense counsel to subpoena and cross-examine psychiatrists or psychologists who report to the court on the defendant’s fitness to proceed in hearings to determine the competency of a defendant to waive his appeals. *Id.*

84. *Id.* at 244.

85. *Calambro ex rel. Calambro v. Second Judicial Dist. Court (Calambro II)*, 964 P.2d 794, 800 (Nev. 1998).

86. *Id.* (quoting *Rees v. Peyton*, 384 U.S. 312, 314 (1966) (per curiam)).

87. *Id.* (quoting *Demosthenes v. Baal*, 495 U.S. 731, 733 (1990) (per curiam)). The Nevada Supreme Court observed that the relevant consideration for determining competency to waive is not whether the inmate “comprehends post conviction legal issues in detail or can ‘grasp the meaning’ of death without resorting to Biblical verses.” *Id.*

specific written findings regarding the inmate's competency to waive.⁸⁸ The state trial court must review the record and the pleadings, as well as hear testimony.⁸⁹ The state supreme court will then review the lower court's decision and "will sustain the trial court's findings when substantial evidence supports them."⁹⁰ In this case, the Nevada Supreme Court directed the lower court "to appoint independent counsel to appear on behalf of [the inmate], and to file points and authorities addressing whether [he] has validly waived appellate review."⁹¹ The specific points and authorities would then be used as evidence in the final determination of competency to waive post-conviction review.⁹²

3. Ohio

In a 1997 volunteer case, the Ohio Supreme Court held that the Ohio Constitution does not prohibit a competent death-row inmate to forego his right to post-conviction review if he so chooses.⁹³ The court adopted a competency-to-waive standard similar to the *Rees* standard, that is, that the defendant has "the mental capacity to appreciate his position and to make a rational choice with respect to continuing or abandoning further litigation."⁹⁴

The court offered an example of constitutionally acceptable procedures that could be implemented for an evaluation and determination of an inmate's ability to waive post-conviction review and

88. *Id.*; see also *Calambro v. State (Calambro I)*, 900 P.2d 340, 343 n.4 (Nev. 1995) (per curiam). In this particular case, the district court did not enter formal, written findings concerning the inmate's competency. *Calambro I*, 900 P.2d at 343 n.4. The state supreme court, however, concluded that a remand for the entry of such findings would serve little purpose under the circumstances because "[t]he record contain[ed] appellant's canvass and the district court's subsequent oral findings [we]re clear." *Id.* Instead the court "reiterate[d] that the district court ha[d] a mandatory duty to enter written findings regarding competency when a defendant seeks to waive appellate review of a sentence of death." *Id.*

89. See *Calambro II*, 964 P.2d at 800-01 (finding substantial evidence supported the trial court's findings, where the district court held a hearing during which medical testimony was given and evidence presented).

90. *Id.* at 800 (citing *Ogden v. State*, 615 P.2d 251 (1980)); see also *Order Denying Petition and Dismissing Appeal* at 5, *Mack ex rel. Mack v. Second Judicial Dist. Court*, No. 46306 (Nev. Feb. 3, 2006).

91. *Calambro I*, 900 P.2d at 343.

92. See *id.*

93. *State v. Berry*, 686 N.E.2d 1097, 1107-08 (Ohio 1997) (per curiam). In 1996, Wilford Berry expressed his decision to waive his remaining appeals challenging his 1990 death sentence for aggravated murder. *Id.* at 1098.

94. *Id.* at 1106; see also *State v. Berry*, 659 N.E.2d 796, 796 (Ohio 1996) (defining the test as "the mental capacity to understand the choice between life and death and to make a knowing and intelligent decision not to pursue further remedies").

volunteer to be executed.⁹⁵ Upon remand, the court instructed the trial court to conduct an evidentiary hearing, which included testimony from psychiatrists, the State, and the defense, any reports from previously appointed doctors, and any other relevant evidence or testimony.⁹⁶ The trial court judge was permitted to base the determination of an inmate's competency to waive on the evidentiary hearing as well as her conversations with and observations of the inmate.⁹⁷ The court did not decide whether observations of and discussions with the inmate are required in order to make a determination of competency to waive post-conviction relief.⁹⁸

4. South Carolina

In 1994, the South Carolina Supreme Court held that the standard to determine competency to waive post-conviction review is the same as the state's competency-to-be-executed standard.⁹⁹ The rigorous South Carolina two-prong competency-to-waive standard is "whether the defendant can understand the nature of the proceedings, what he or she

95. See *Berry*, 686 N.E.2d at 1099 (noting that the Supreme Court of Ohio had earlier remanded the case for an evidentiary hearing on the issue of the inmate's competency).

96. *Id.* In *Berry*, the lower court heard testimony from two psychiatrists for the state and two for the defense. *Id.* Ultimately, after hearing oral arguments, the Ohio Supreme Court concluded that *Berry* was competent to waive his remaining appeals. *Id.* at 1099-1100. After the hearing, *Berry* sustained head injuries in a prison riot. *Franklin v. Francis*, 168 F.3d 261, 261-62 (6th Cir. 1999) (*per curiam*). *Berry*'s mother and sister filed a petition for federal habeas relief, moved for a stay of execution, and asked for additional competency evaluations due to *Berry*'s new head injuries, but the district court denied the request and the Sixth Circuit affirmed. *Id.* at 261.

97. See *Berry*, 686 N.E.2d at 1099.

98. See *id.* at 1106.

99. *Singleton v. State*, 437 S.E.2d 53, 58, 61-62 (S.C. 1993). Fred Singleton was "convicted and sentenced to death for murder, burglary, larceny of a motor vehicle, and first-degree criminal sexual conduct." *Id.* at 54. The conviction and sentence were affirmed on appeal in 1985. *Id.* Singleton filed two petitions for post-conviction review, the first of which was denied in May 1986. *Id.* at 54-55. The second petition for post-conviction review, filed in March 1990, claimed that Singleton was incompetent to be executed. *Id.* at 55. The lower court adopted the ABA Criminal Justice Mental Health Standard for incompetency rather than the standard set forth in Justice Powell's concurrence in *Ford*. The State of South Carolina then appealed the decision of the trial court. *Id.* at 55; see also STANDARDS FOR CRIMINAL JUSTICE, *supra* note 73. The South Carolina Supreme Court adopted a two-prong competency-to-be-executed standard, which it "slightly modified" from the ABA Standard:

The first prong is the cognitive prong which can be defined as: whether a convicted defendant can understand the nature of the proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. The second prong is the assistance prong which can be defined as: whether the convicted defendant possesses sufficient capacity or ability to rationally communicate with counsel.

Singleton, 437 S.E.2d at 58.

was tried for, the reason for the punishment, and whether the convicted defendant possesses sufficient capacity or ability to rationally communicate with counsel.”¹⁰⁰ The court explained that the incompetency standard depends not on whether the condemned actually cooperates with his attorney, “but whether he has sufficient mental capacity to do so.”¹⁰¹ A failure of either the cognitive prong *or* the assistance prong is sufficient grounds to stay an inmate’s execution and deny a motion to waive post-conviction proceedings.¹⁰²

In 2006, the court described the evidence it considers in determining an inmate’s competency, and concluded that the court must

carefully and thoroughly review the appellant’s history of mental competency; the existence and present status of mental illness or disease suffered by the appellant, if any, as shown in the record of previous proceedings and in the competency hearing; the testimony and opinions of mental health experts who have examined the appellant; the findings of the circuit court which conducted a competency hearing; the arguments of counsel; and the appellant’s demeanor and personal responses to our questions at oral argument regarding the waiver of appellate and PCR [post-conviction relief] rights.¹⁰³

These required considerations allow the South Carolina Supreme Court, upon review of the lower court’s required full evidentiary hearing, to review a complete record.¹⁰⁴ Upon careful review of prior proceedings and an in-depth colloquy with the volunteer, the court then determines whether the inmate is mentally competent and whether his waiver of post-conviction relief is “knowing and voluntary.”¹⁰⁵

100. *State v. Torrence*, 451 S.E.2d 883, 884 (S.C. 1994); *see also id.* at 884 n.2 (“Although a capital defendant’s waiver of appeal has been upheld upon a showing that he/she has the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his/her sentence, we find the more stringent standard of *Singleton* appropriate”) (citations omitted)).

101. *Id.* at 884 n.2; *see also Norman*, *supra* note 12, at 127.

102. *Hughes v. State*, 626 S.E.2d 805, 809 (S.C. 2006). Mar-Reece Aldean Hughes was convicted in 1995 for the murder of a police officer and sentenced to death. *Id.* at 807. In February 2006, the South Carolina Supreme Court ruled that Hughes was incompetent to waive his right to pursue post-conviction review. *Id.* at 815. The court found that Hughes did not understand the nature of the appeal he was waiving and was unable to rationally communicate with his attorney. *Id.*

103. *Id.* at 808.

104. *Id.*; *see also State v. Torrence*, 473 S.E.2d 703, 704-05 (S.C. 1996).

105. *Torrence*, 473 S.E.2d at 705; *see also Hughes*, 626 S.E.2d at 808-09. The South Carolina Supreme Court also announced that it is “within [its] discretion” to decide whether to allow a volunteer to waive his appeals. *Hughes*, 626 S.E.2d at 809.

D. Cases of Volunteers Who Met State Standards of Competency and Were Executed in 2006

1. Montana: David Thomas Dawson

In February 1987, a jury convicted David Thomas Dawson of one count of robbery and multiple counts each of aggravated kidnapping and deliberate homicide.¹⁰⁶ Dawson challenged his convictions through appeals in state and federal courts, including a petition for writ of certiorari to the United States Supreme Court, but then filed a *pro se* motion in the Montana Supreme Court dismissing all appeals and discharging his appellate counsel in August 2004.¹⁰⁷

On remand from the state supreme court, a Montana trial court held a hearing on Dawson's *pro se* motion in which the court, the State, and defense counsel questioned Dawson.¹⁰⁸ Prior to this hearing, the state trial court reviewed the entirety of Dawson's file, including psychological reports from two federally-appointed experts, produced for the simultaneous federal court proceedings.¹⁰⁹ The state trial court

106. *State v. Dawson*, 133 P.3d 236, 239 (Mont. 2006). Dawson kidnapped and robbed a family of four at gunpoint, then bound and gagged the victims in his motel room. The Clark County Prosecuting Attorney, The Death Penalty, David Thomas Dawson, <http://www.clarkprosecutor.org/html/death/US/dawson1039.htm> (last visited Oct. 23, 2007). Two days later, the police rescued Amy, fifteen years old, the only survivor. *Id.* Police found Amy's parents and brother strangled to death with a telephone cord. *Id.* Dawson was found in the room with them. *Id.* Dawson received death sentences, one for each count of deliberate homicide and one for each count of aggravated kidnapping of the three murder victims. *See Dawson*, 133 P.3d at 239. Dawson was also sentenced to one hundred years' imprisonment for the aggravated kidnapping of Amy, and an additional ten years for the use of a dangerous weapon. *Id.*

107. *Dawson*, 133 P.3d at 239. At this time, Dawson, who had previously filed a habeas petition with the United States District Court for the District of Montana, filed a motion to dismiss his petition in that court as well. *Id.* at 239-40.

108. *Id.* at 240. During his conversations with the court, the judge asked Dawson about his decision-making process, whether he was motivated by suicidal ideations, and whether he understood the consequences of his decision. *Id.* at 245-46. At one point, Dawson said to the open court that

this is a decision that's been years in the making. And I've looked at every factor that I possibly can. And I understand the possibilities of what the future might bring if I were to continue my appeals. That's part of the decision-making. And I have looked at everything as far as I'm aware of to come up with this decision. So I am aware of the current law, and I am aware that, very likely, I could get resentenced. But I don't know that for a fact, I don't know what the future would bring. But it is part of my decision-making. And at the same time, I have come up with the decision to stop my appeal.

Id. at 245.

109. *Id.* at 239-40 (explaining that the Yellowstone County District Court "obtained and reviewed the reports submitted to the U.S. District Court" and was "familiar with the entirety of Dawson's file"). One of the two federally-appointed experts was a psychiatrist and the other was a clinical psychologist. *See id.* at 239, 243.

concluded that Dawson was competent and waived his post-conviction review “knowingly, voluntarily, and intelligently.”¹¹⁰ Dawson’s counsel appealed.¹¹¹ In *State v. Dawson*, the Montana Supreme Court held that the trial court based its determination on more than adequate evidence, referring to passages of the trial court’s discussion with Dawson and the competency evaluations completed by the “two mental health professionals.”¹¹² The state supreme court affirmed the lower court’s finding of Dawson’s competency to waive his post-conviction review, dismissed the remaining appeals, and remanded for execution of the judgment.¹¹³ David Thomas Dawson was executed by lethal injection on August 11, 2006 at 12:06 a.m.¹¹⁴

2. Nevada: Daryl Linnie Mack

Daryl Mack was found guilty before a judge, and a three-judge panel sentenced him to death in May 2002.¹¹⁵ In 2003, the Nevada Supreme Court found that Mack validly waived his right to a jury trial, including his right to have a jury decide his sentence.¹¹⁶

In 2005, Mack told Washoe District Judge Robert Perry that he no longer wished to challenge his death sentence.¹¹⁷ Two subsequent evidentiary hearings were held to determine Mack’s competency to waive his post-conviction appeals.¹¹⁸ Two of three psychiatrists who evaluated Mack found him competent to waive his post-conviction appeals.¹¹⁹ After allowing testimony and reading the reports of three

110. *Id.* at 240.

111. *Id.* Dawson’s appellate counsel addressed the possible suicidal motivations of their client, asserting that confinement, lack of proper care for his health problems, and recent suicides in the prison could have been stressors. *Id.* at 247.

112. *See id.* at 240.

113. *Id.* at 249 (“Dawson is not suffering from a mental disease, disorder, or defect, he has the capacity to appreciate his position, he has made a rational choice with respect to continuing or abandoning further litigation, and his motion to dismiss this appeal is voluntarily made.”).

114. The Clark County Prosecuting Attorney, *supra* note 106.

115. *Mack v. State*, 75 P.3d 803, 804-05 (Nev. 2003) (per curiam). *See generally* The Clark County Prosecuting Attorney, The Death Penalty, Daryl Linnie Mack, <http://www.clarkprosecutor.org/html/death/US/mack1019.htm> (last visited Oct. 15, 2007) (offering information about death row executions, including a summary of the case, case citations, and other internet sources and articles written about the case).

116. *Mack*, 75 P.3d at 804, 807.

117. *Id.* at 804.

118. *See* Transcript of Proceedings, Post-Conviction Evidentiary Hearing at 4, *Mack v. State*, No. CR00-2225 (Nev. 2d Jud. Dist. Ct. Washoe County July 26, 2005) [hereinafter July 26 Hearing]; *see also* Transcript of Proceedings, Post-Conviction Evidentiary Hearing at 3, *Mack*, No. CR00-2225 (Oct. 25, 2005) [hereinafter Oct. 25 Hearing].

119. Oct. 25 Hearing, *supra* note 118, at 9. One psychiatrist had been appointed by the court. July 26 Hearing, *supra* note 118, at 7-8.

psychiatrists, the court found that Mack's waiver was "knowingly, voluntarily and intelligent[ly]" made, and ordered a warrant of execution to be written and carried out.¹²⁰ Daryl Linnie Mack was executed by lethal injection on April 26, 2006 at 9:06 p.m.¹²¹

3. Ohio

a. Rocky Barton

In one of Ohio's quickest death penalty cases,¹²² Rocky Barton was convicted of aggravated murder on September 29, 2003, and urged jurors to recommend the death penalty.¹²³ On October 10, 2003, Barton was sentenced to death for one count of aggravated murder.¹²⁴

Following one automatic appeal filed on November 20, 2003, the Ohio Supreme Court upheld Barton's sentence and set an execution date for January 14, 2004.¹²⁵ Barton was determined to go through with the execution date, but his defense counsel filed a motion for a stay of

120. Order Dismissing Petition for Writ of Habeas Corpus (Post-Conviction) at 1, *Mack*, No. CR00-2225 (Nov. 9, 2005); see also Warrant of Execution at 1, *Mack*, No. CR00-2225 (Nov. 9, 2005). Petitioner Daryl Linnie Mack's execution date was halted when his mother, Viola Mack, as next friend, appealed the dismissal of his application for a writ to the Nevada Supreme Court. Notice of Appeal at 1, *Mack*, No. CR00-2225 (Nov. 21, 2005). Due to this petition, the execution of Daryl Linnie Mack was postponed until April 26, 2006. The Clark County Prosecuting Attorney, *supra* note 115.

121. The Clark County Prosecuting Attorney, *supra* note 115.

122. Rocky Barton murdered his fourth wife on January 16, 2003. On July 12, 2006, he was executed. The Clark County Prosecuting Attorney, The Death Penalty, Rocky Barton, <http://www.clarkprosecutor.org/html/death/US/barton1031.htm> (last visited Nov. 19, 2006).

123. *State v. Barton*, 844 N.E.2d 307, 313-14 (Ohio 2006) (At the penalty phase of the trial Mr. Barton was quoted as having said: "At this time my attorneys advised me to beg for my life. I can't do that. I strongly believe in the death penalty. And for the ruthless, cold-blooded act that I committed, if I was sitting over there, I'd hold out for the death penalty. * * * I've recently done 10 years in prison. Life in prison would be a burden to all the citizens of Ohio. It would be at their cost. I wouldn't have nothing to worry about. I'd get fed every day, have a roof over my head, free medical, you people pay for it, I'd have a stress-free life. That's not much of a punishment. Punishment would be to wake up every day and have a date with death. That's the only punishment for this crime. That's all I've got to say.").

124. *Id.* at 314. Barton was convicted of "aggravated murder with prior calculation and design" and a gun charge, which were found to merit the death penalty in light of Barton's prior convictions for attempted murder and another gun charge. See *id.* at 309. Barton shot his wife at close range with a shotgun, in front of his 17-year-old stepdaughter, and then turned the gun on himself in a failed suicide attempt. *Id.* at 310, 312.

125. The Supreme Court of Ohio, Case Number 2003-2036, http://www.sconet.state.oh.us/clerk_of_court/ecms/resultsbycasenumber.asp?type=3&year=2003&number=2036&myPage=searchbycasenumber%2Easp (last visited Oct. 26, 2007) [hereinafter Barton Docket].

execution so that a competency evaluation of Barton could be undertaken.¹²⁶

On June 22, 2006, the Ohio Supreme Court remanded the case to the Warren County Court of Common Pleas for the limited purpose of holding an evidentiary hearing to determine whether Barton made a voluntary, knowing, and intelligent waiver, and additionally whether further psychiatric evaluation was necessary.¹²⁷ After an evidentiary hearing where Barton had the opportunity to speak with the court, the court of common pleas overruled the motion for a psychiatric evaluation, finding Barton competent to waive further appeals and having “the mental capacity to understand the choice between life and death.”¹²⁸

The Ohio Supreme Court affirmed the lower court’s determination of competency and upheld the impending execution date.¹²⁹ The state supreme court found that the lack of a competency hearing upon Barton’s decision not to offer mitigating evidence was not error. Furthermore, neither a lack of cooperation with counsel nor an attempted suicide constituted sufficient indicia of incompetence to raise questions about Barton’s competency and necessitate a hearing.¹³⁰ Rocky Barton was executed by lethal injection on July 12, 2006 at 10:27 a.m.¹³¹

126. Appellant Rocky Barton’s Motion for an Evaluation to Determine Competency to Waive Further Direct and Collateral Challenges to His Death Sentence 2, *Barton*, No. 03-2036 (May 22, 2006).

127. *Barton*, 849 N.E.2d at 1030. The Ohio Supreme Court instructed the trial court that where a competency evaluation is deemed necessary, the court should follow specific statutory instructions regarding the appointment of an examiner, as well as in the conduct and completion of a psychiatric report. *Id.*; see also OHIO REV. CODE ANN. R.C. § 2945.371(A)-(F) (LexisNexis 2006). The court further instructed that if a psychiatric evaluation were to be ordered, the examiner must follow the *State v. Berry* test in evaluating Barton. *Barton*, 849 N.E.2d at 1030; see also *State v. Berry*, 659 N.E.2d 796, 796 (Ohio 1996) (“A capital defendant is mentally competent to abandon any and all challenges to his death sentence . . . if he has the mental capacity to understand the choice between life and death and to make a knowing and intelligent decision not to pursue further remedies.” (citations omitted)); The Clark County Prosecuting Attorney, *supra* note 122; Barton Docket, *supra* note 125.

128. The Clark County Prosecuting Attorney, *supra* note 122. The court noted that in the evidentiary hearing, nine exhibits were presented and Barton testified, through questioning by his counsel, the Warren County Prosecutor, and the court. *Id.* (adding that Barton was “offered an opportunity to express anything further not covered through questioning but [that he] indicated he had had the opportunity to say everything he wanted to say”); see also Barton Docket, *supra* note 125.

129. *State v. Barton*, 844 N.E.2d 307 (Ohio 2006).

130. *Id.* at 316 (“The right to a hearing rises to the level of a constitutional guarantee when the record contains sufficient “indicia of incompetency * * *” [sic.]”); see also *id.* at 317.

131. The Clark County Prosecuting Attorney, *supra* note 122.

b. Darrell W. Ferguson

Just a few months after his release from prison, Darrell W. Ferguson was arrested and indicted for multiple counts of aggravated murder.¹³² Ferguson waived a jury trial, pled guilty to all charges, waived the presentation of mitigating evidence, and actively sought the death penalty.¹³³ Prior to trial, the court *sua sponte* ordered that Ferguson undergo a general competency evaluation.¹³⁴ After the defense requested a psychiatrist be appointed as an examiner, the trial court instead appointed a clinical psychologist to conduct the competency evaluation.¹³⁵ A three-judge panel of the trial court reviewed the competency evaluation, offered the defense an opportunity to challenge the evaluation's findings, and twice questioned Ferguson "at length."¹³⁶ Based almost entirely on this evidence and the opportunity to observe Ferguson's behavior and demeanor,¹³⁷ the trial court ultimately deemed Ferguson competent to stand trial, waive his right to a jury trial, plead guilty, and waive mitigation.¹³⁸ Ferguson was sentenced to death for six aggravated murder charges.¹³⁹

On April 24, 2006, Ferguson's attorney filed a motion requesting the Ohio Supreme Court to reconsider its April 12 ruling that rejected an additional competency hearing and ultimately affirmed Ferguson's

132. *State v. Ferguson*, 844 N.E.2d 806, 811 (Ohio 2006). Upon completion of his two-year term in prison for burglary, Ferguson was required to participate in a substance-abuse treatment program in Cincinnati. *Id.* at 809. On December 20, 2001, Ferguson received permission to visit his mother in Dayton, Ohio for two days, but he never returned to the program. *Id.* Instead, Ferguson committed multiple murders. *Id.* at 809-10.

133. *Id.* at 812-13. Ferguson was indicted for one count of escape, two counts of aggravated burglary, one count of robbery, three counts of aggravated robbery, one count of evidence tampering, and six counts of aggravated murder. *Id.* at 812. In a January 7, 2003 letter, Ferguson wrote to the trial judge, "[I] * * * is asking you in my right state of mind would you please Find it in good will to give me the Death penalty." *Id.* (alteration in original).

134. *Id.* at 813.

135. *Id.*

136. *Id.* at 817. The competency evaluation by the clinical psychologist was conducted over a period of nine-and-a-half hours over five days. *Id.* at 815.

137. *Id.* at 816-17.

138. *Id.* at 817.

139. *Id.* at 813. The six aggravated murder charges

each contained five identical death-penalty specifications: murder to escape detection or apprehension; murder while at large after breaking detention; murder as a "course of conduct" in killing two or more people; murder while committing or attempting to commit aggravated burglary; and murder while committing or attempting to commit aggravated robbery.

Id. at 812 (internal citations omitted).

conviction and death sentence.¹⁴⁰ The court denied the motion to reconsider on June 7, 2006 and set an execution date of August 8, 2006.¹⁴¹ Other than the evaluation of the clinical psychologist and the determination of the defense psychiatrist that more testing was needed, both of which occurred prior to sentencing, there was no separate testing or hearing to determine Ferguson's competency to waive post-conviction appeals.¹⁴² Darrell Wayne Ferguson was executed by lethal injection on August 8, 2006 at 10:21 a.m.¹⁴³

4. South Carolina: William E. Downs, Jr.

William Downs pled guilty to the kidnapping, rape, and murder of a six-year old boy in 2002.¹⁴⁴ Before he was sentenced to death, Downs requested the death penalty, telling the circuit judge that he believed he deserved to die for his crime.¹⁴⁵

After Downs' conviction and death sentence were affirmed on direct appeal, Downs requested that he be allowed to waive his right to post-conviction relief and be executed.¹⁴⁶ The South Carolina Supreme Court remanded the case to the trial court for a competency hearing.¹⁴⁷ At the first evidentiary hearing, in February 2005, the trial judge granted the defense counsel's motion, and ruled that the State could offer the

140. Motion for Reconsideration at 1, *State v. Ferguson*, 848 N.E.2d 859 (Ohio 2006) No. 03-1904. In its earlier decision, the court determined that because the defense stipulated that the court-appointed psychologist "would be qualified as an expert and she would testify in accordance with her report," the defense made a strategic decision to forego the opportunity to cross-examine the psychologist and present its own testimony. *Ferguson*, 844 N.E.2d at 819. On appeal, Ferguson's attorney argued that the court's decision, based on the availability of the defense psychiatrist to testify and the defense's failure to call him, was erroneous because the defense psychiatrist never expressed a psychiatric opinion. Motion for Reconsideration, *supra*, at 2. Instead, the defense psychiatrist only testified to the need for further testing, and thus was unavailable to testify to Ferguson's competency. *Id.*

141. Reconsideration Entry at 1, *Ferguson*, 848 N.E.2d 859 (No. 03-1904).

142. See *Ferguson*, 844 N.E.2d at 814-15.

143. The Clark County Prosecuting Attorney, The Death Penalty, Darrell Wayne Ferguson, <http://www.clarkprosecutor.org/html/death/US/ferguson1038.htm> (last visited Oct. 23, 2007).

144. *State v. Downs*, 604 S.E.2d 377, 378 (S.C. 2004). In 2005, Downs also pled guilty to having kidnapped, raped, and killed a 10-year-old boy in Augusta, South Carolina in 1991. The Clark County Prosecuting Attorney, The Death Penalty, William E. Downs, Jr., <http://www.clarkprosecutor.org/html/death/US/downs1032.htm> (last visited Nov. 19, 2006). Since he was already sentenced to death in South Carolina, Downs received an additional two consecutive life sentences, plus ten years. *Id.*

145. The Clark County Prosecuting Attorney, *supra* note 144 (quoting Downs as saying, "I think it would be disrespectful to the family and disrespectful to the whole world if you did not give me the death penalty").

146. *State v. Downs*, 631 S.E.2d 79, 80 (S.C. 2006).

147. *Id.* at 81.

testimony of its two psychiatric experts and the defense would be allowed to cross-examine those doctors at a later date.¹⁴⁸ A second hearing was held one month later.¹⁴⁹ During these hearings, three experts testified that Downs was mildly depressed, but that he was still competent under both prongs of the state's competency-to-waive standard.¹⁵⁰ One defense psychiatrist maintained she needed more time to evaluate Downs before offering an opinion; Downs' trial attorney testified to his competency.¹⁵¹

Upon hearing the expert testimony and speaking with Downs,¹⁵² the trial judge found Downs competent to waive his appeals and be executed under the *Singleton* standard.¹⁵³ Upon review, the South Carolina Supreme Court found that the trial judge did not abuse his discretion in denying the motion for a continuance and affirmed the lower court's findings that Downs was competent to waive his post-conviction appeals and that his waiver was knowing and voluntary.¹⁵⁴ William E. Downs, Jr. was executed by lethal injection on July 14, 2006 at 6:17 p.m.¹⁵⁵

148. *Id.*

149. *Id.*

150. *See id.* at 84.

151. *Id.* at 84-85. The defense psychiatrist wanted more time to evaluate and treat Downs to determine whether he met the criteria for major depressive disorder. *Id.* The defense attorney also testified that while he thought Downs had "significant mental health issues and . . . was depressed," he felt that at the time he worked with Downs, Downs was "competent to stand trial and had the ability to rationally communicate with him," and had not changed much since. *Id.* at 82-83.

152. *Id.* at 83. During the hearing, Downs disagreed with the ability of the psychiatric or psychological experts to render a diagnosis because of the short amount of time they spent with him. Transcript of Record at 271-72, *Downs*, 631 S.E.2d 79 (Nos. 1999-GS-02-1230, -1231, -1232) [hereinafter March 2005 Competency Hearing]. Downs ended his dialogue with the court by requesting "that if it is proven that I am competent, which I believe it will be, [to] impose an injunction upon [Downs' counsel] to not file anymore [sic] motions or anything in my case, [because] I will be firing him." *Id.* at 273.

153. *Downs*, 631 S.E.2d at 81, 84; *see supra* note 99 (setting forth the *Singleton* standard). The trial judge "specifically found [Downs] did not have a present wish to commit suicide or die," but that he simply had maintained throughout the proceedings that he would "prefer[] death to being locked up for the rest of his life." *Downs*, 631 S.E.2d at 84. In closing the competency hearing, the trial judge said to Downs that it had "been a pleasure to get to know [him] from this distance as a trial judge" throughout the proceedings, and that Downs had been "one of the most courteous, attentive, and, I think, competent defendants I've ever had the opportunity to observe since I've been on the bench." March 2005 Competency Hearing, *supra* note 152, at 277.

154. *Downs*, 631 S.E.2d at 85.

155. The Clark County Prosecuting Attorney, *supra* note 144.

II. AN EVALUATION OF STATE PROCEDURES FOR IMPLEMENTING COMPETENCY STANDARDS

The Supreme Court in *Ford* noted that the determination of competency as a prerequisite to a constitutional execution requires “no less stringent standards than those demanded in any other aspect of a capital proceeding.”¹⁵⁶ Arguably, these stringent standards are necessary not only in determining whether a volunteer meets the standard of competency to be executed, but also in evaluating the volunteer’s competency to waive post-conviction review.¹⁵⁷

A. *The Baseline Model of Procedures Necessary to Ensure an Inmate’s Competency to Waive Post-Conviction Relief*

Most legal scholars who have proposed model competency evaluations have focused on the standard of competency to be executed and the procedures involved in that determination.¹⁵⁸ When analyzing state procedures used to implement standards of competency to waive, five basic requirements emerge from the literature that ensure an adequate determination of volunteer incompetency to waive post-conviction relief rights. These five requirements are an extension of the three minimal procedures set forth in *Ford*, which simply require the presentation of relevant material so the court can make an informed decision, an opportunity for defense counsel or the inmate to challenge or impeach state-appointed psychiatrists’ opinions, and assurances that the final decision is not left solely to the executive branch.¹⁵⁹

The first basic procedure that should be required in every state to ensure the correctness of the competency determination is that at least one neutral evaluator, such as a court-appointed psychiatrist, must

156. *Ford v. Wainwright*, 477 U.S. 399, 411-12 (1986).

157. See, e.g., Blume, *supra* note 3, at 943 (advocating for a more thorough standard for competency to waive post-conviction review that considers “the prevalence of suicidal motivation among volunteers” to ensure the mentally incompetent are not executed).

158. See, e.g., Ebert, *supra* note 10, at 35 (arguing that courts must “recognize all contributors to incompetency”); Norman, *supra* note 12, at 118 (emphasizing the need to avoid “an ‘arbitrary’ or ‘capricious’ execution”); cf. Blume, *supra* note 3, at 959 (observing that it is difficult to compare volunteer rates to general suicide rates). But see Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169, 1173-74 & nn.27-29 (2005) (suggesting that reasonable procedures already exist (citing *Coe v. Bell*, 209 F.3d 815, 818-20 (6th Cir. 2000); ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-5.7(a)-(d) (1988)). See generally Phyllis L. Crocker, *Not to Decide Is to Decide: The U.S. Supreme Court’s Thirty-Year Struggle with One Case About Competency to Waive Death Penalty Appeals*, 49 WAYNE L. REV. 885 (2004) (discussing *Rees*).

159. See *Ford*, 477 U.S. at 414-16.

conduct an independent evaluation of the inmate.¹⁶⁰ The neutral evaluator would be required in addition to state and defense psychiatrists or psychologists, because both the state and the defense should have the right to introduce their own evidence and reports.¹⁶¹ An optimal evaluation would be conducted, however, by an entire panel of neutral psychiatric or psychological evaluators, which would ensure that the evaluations are presented to the fact-finder in an unbiased and thorough manner.¹⁶²

A second basic procedure that should be required is specific psychological and intelligence testing of the inmate, conducted by the neutral evaluator(s).¹⁶³ These tests would provide clinical and empirical evidence specifically for the purpose of determining whether the volunteer meets the state's standard of competency to waive post-conviction relief.¹⁶⁴

The third baseline procedure for implementing a state's competency-to-waive standard is thorough evaluations, which specifically include exploration of the particular motivations behind the inmate's reason for volunteering to be executed.¹⁶⁵ A thorough investigation will ideally be conducted by the neutral evaluator(s) and include the examination of the

160. *See id.* at 417 ("Also essential is that the manner of selecting and using the experts responsible for producing that 'evidence' must be conducive to the formation of neutral, sound, and professional judgments as to the prisoner's ability to comprehend the nature of the penalty.").

161. *Cf. Hamilton v. Texas*, 497 U.S. 1016, 1019 (1990) (Brennan, J., dissenting) (noting the circumstances in which federal habeas proceedings are required because state procedures were inadequate); *Ford*, 477 U.S. at 416-17 (maintaining that there should be at least the minimal basic due process requirements).

162. Interview with Lindsay Glauner, former Senior Project Attorney, Am. Bar Ass'n Death Penalty Moratorium Implementation Project, in Wash., D.C. (Nov. 3, 2006).

163. *See Ebert, supra* note 10, at 48-49 (including as an element of a thorough competency evaluation both psychological and intelligence testing). Ebert offers a table of psychological tests and their specific uses. *See id.* at 53-55 tbl.1. The table presents numerous tests for fifteen conditions that should be considered when evaluating an inmate's competency to waive, including: intellectual deficits, memory problems, personality disorders, personality functioning, interpersonal relations, depression, suicide, alcohol problems, schizophrenia, Post Traumatic Stress Disorder, bipolar disorder, anxiety disorder, adjustment disorders, psychosomatic disorders, and neuropsychological problems. *Id.*

164. *See id.* at 36-43 (discussing the need for standards and how to find them).

165. *See Igasaki et al., supra* note 73, at 673. Igasaki's proposal for creating a more thorough evaluation of competency to waive post-conviction relief emphasizes that "[a]ny meaningful competence inquiry in this context [of volunteers] must focus not only on the prisoner's understanding of the consequences of the decision, but also on his or her reasons for wanting to surrender, and on the rationality of the prisoner's thinking and reasoning." *Id.*

inmate's personal belongings,¹⁶⁶ past medical records, education, and relationship history.¹⁶⁷

The fourth procedure that should be required in every state is the implementation of lengthy interviews conducted over an extended period of time with both the inmate and his close contacts.¹⁶⁸ These contacts include family, friends, past and present attorneys, correctional officers, and other persons whom the inmate comes into contact with on a relatively consistent basis.¹⁶⁹ The interviews with the inmate and his contacts should be conducted by the neutral psychiatrist, and memorialized in written reports that are submitted to the court to ensure that all available information to make an educated decision is presented.¹⁷⁰ The court also should be required to have its own dialogue with the inmate, in which the court interacts with the inmate and poses specific questions regarding the inmate's competency.¹⁷¹

Finally, the fifth procedural requirement should be that the trial court must hold an evidentiary hearing, separate from any other hearing conducted by the trial court or district court, for the purpose of specifically evaluating the inmate's competency to waive post-conviction review under the state standard.¹⁷² The lower court's hearing allows the state's highest court to review the lower court's finding of fact, and determine whether the correct procedures were followed and standards were applied.¹⁷³ This would "ensure[]" that at least two independent

166. Ebert, *supra* note 10, at 49 (proposing that a review of the inmate's records and documents would include, without limitation, any videotapes of the inmate, art work by the inmate, records or transcripts, and recent writings or letters by the inmate). Ebert proposes a thorough model instrument to determine competency to be executed, emphasizing the need for many forms of reliable testing in order to ensure the states do not execute the presently insane. *See id.*

167. *Id.* 47-50. Ebert suggests that for a proper determination of competency to be executed, the decision must be based on a complete background history on fourteen topics, including relationship history, medical and psychological records, drug and alcohol abuse, and family history. *Id.* at 47-48. He also articulates the need for the utilization of a "specific clinical instrument" to be used in conjunction with the above components. *Id.* at 50.

168. *Id.* at 50 n.156 (suggesting that one element of a thorough competency evaluation would include interviews with friends, family and other contacts to compare with objective sources of information).

169. *Id.*

170. *See id.* at 50 (discussing how collateral contacts can provide key information that could be useful).

171. Norman, *supra* note 12, at 133 (arguing that in order for a trial judge to correctly determine a volunteer's competency to waive post-conviction review, "the trial judge should conduct a 'probing inquiry'" with the volunteer) (citing *Rumbaugh v. Procunier*, 753 F.2d 395, 412 (5th Cir. 1985) (Goldberg, J., dissenting)).

172. *Id.* at 132.

173. *Id.*

bodies review” the inmate’s competency to waive post-conviction appeals.¹⁷⁴

B. State Procedures Within Specific 2006 Cases: Are the States Meeting the Minimum Proposed Requirements?

1. Montana

In *Dawson*, the State of Montana did not appoint neutral evaluators because the federal court had already appointed two neutral experts.¹⁷⁵ These circumstances make it impossible to determine whether Montana met the first required guideline. Despite the lack of state-appointed neutral evaluators, the Montana Supreme Court based its decision on the two neutral experts who conducted psychological testing to develop their forty-page forensic psychiatric evaluation and ten-page psychological evaluation.¹⁷⁶ Therefore Montana arguably met the second suggested procedure.

The State of Montana also met both the third and fourth suggested procedures. The experts’ evaluation included lengthy “interviews with Dawson’s attorneys, mother, and a long-time friend,” review of “extensive collateral material,” and clinical interviews and psychological testing.¹⁷⁷ Interviews with Dawson by the court, the experts, and his attorneys delved into the motivations behind Dawson’s decision to waive his appeals.¹⁷⁸ Moreover, the state trial court held a hearing to determine whether Dawson was competent under the state’s competency-to-waive standard.¹⁷⁹ As a result, Montana met the fifth recommended procedure.

2. Nevada

In *Mack*, the State of Nevada appointed three neutral psychiatrists to examine and interview Darryl Linnie Mack, in addition to the psychiatrists who had previously met with Mack to determine his competency to waive his post-conviction relief.¹⁸⁰ The appointment of

174. *Id.*

175. See *supra* notes 108-09 and accompanying text.

176. *State v. Dawson*, 133 P.3d 236, 243-44 (Mont. 2006) (“[P]sychological testing revealed no basis for a specific personality disorder diagnosis . . . no[r] any evidence of mental illness, psychosis, significant mood disorder or organicity, either presently or historically.”).

177. *Id.* at 244.

178. *Id.* at 241-42, 245-48.

179. See discussion *supra* Part I.D.1.

180. Order Denying Petition and Dismissing Appeal at 2-3, *Mack v. State*, No. 46306 (Nev. Feb. 3, 2006) (stating that two psychiatrists examined Mack pursuant to a court order). Subsequently, the district court ordered a third psychiatrist to evaluate Mack. *Id.* at 3; see also Transcript of Proceedings, Post-Conviction Oral Arguments at 10, *Mack*, No.

three evaluators indicates that Nevada met the first required basic procedure, ensuring that the evaluations of Mack were presented to the fact-finder in an unbiased, thorough manner. However, Nevada did not meet the second requirement when the three court-appointed psychiatrists failed to perform specific psychological and intelligence testing to determine whether Mack met the state's competency-to-waive standard.¹⁸¹

Nevada met the third basic requirement of thorough evaluations despite the fact that none of the court-appointed psychiatrists administered DSM-accepted testing.¹⁸² The transcripts of the proceedings and other court documents indicate that all three psychiatrists consulted few sources in completing Mack's competency-to-waive evaluation, including his prison medical and psychiatric records, as well as "extensive" interviews with the inmate.¹⁸³ However, they could have consulted additional factors—such as Mack's education and relationship history, as well as his personal belongings—for a more thorough evaluation.¹⁸⁴

Nevada met the fourth requirement because the courts held multiple evidentiary hearings, and gave Mack the opportunity to speak with the court to express his thoughts on waiving his post-conviction appeals and going forward with the execution.¹⁸⁵ Finally, Nevada met the fifth required procedure because the trial court held not one but two evidentiary hearings,¹⁸⁶ both reviewed by the Nevada Supreme Court. Furthermore, the Nevada Supreme Court noted that "[a]s for the adequacy of the evidentiary hearing, the district court did not limit Mack's counsel's presentation of evidence."¹⁸⁷

CR00-2225 (Nev. 2d Jud. Dist. Ct. Washoe County May 11, 2005) (mentioning that the evaluators were agreed to by the court, the State and the defense).

181. See Order Denying Petition and Dismissing Appeal, *supra* note 180, at 4-6 (discussing a letter from a psychologist faulting the evaluations of the three court-appointed psychiatrists because they did not "administer[] psychological tests to ascertain whether Mack was minimizing psychopathology").

182. DSM refers to the Diagnostic and Statistical Manual of Mental Disorders, which is published by the American Psychiatric Association and covers all mental health disorders for both children and adults. It also lists known causes of these disorders, statistics in terms of gender, age at onset, and prognosis as well as some research concerning the optimal treatment approaches.

183. Order Denying Petition and Dismissing Appeal, *supra* note 180, at 3, 6.

184. See *supra* note 166-67 and accompanying text.

185. See generally sources cited *supra* note 118.

186. See generally sources cited *supra* note 118.

187. Order Denying Petition and Dismissing Appeal, *supra* note 180, at 6.

3. Ohio

Ohio's two cases illustrate the need for specific required procedures, based on the arbitrary nature in which they were applied in one case but not the other. In *Ferguson*, the volunteer was examined by a court-appointed psychologist at the request of defense counsel.¹⁸⁸ In *Barton*, the defense counsel's retained psychologist interviewed Barton for several hours prior to trial, but neither he nor defense counsel ever raised the issue of competency.¹⁸⁹ Furthermore, no neutral evaluator was appointed to evaluate Barton; in fact, the State convinced the court that no competency evaluation was needed.¹⁹⁰ The *Barton* case illustrates that Ohio failed the first required procedure, and further demonstrates the need for these procedures to be carried out uniformly in every case.¹⁹¹ The consequence of allowing disparate application of these procedures is quite grave—the execution of incompetent inmates.

As for the second required procedure, the occurrence of specific psychological and intelligence testing, Ohio arguably met this baseline requirement in *Ferguson* by ordering a psychologist's competency evaluation, but did not with respect to *Barton*.¹⁹² With respect to the third procedure, thorough evaluations, Ohio blatantly failed to meet this prong in *Barton* since no evaluation of Barton occurred.¹⁹³ Ohio also failed to meet the fourth recommendation for lengthy interviews both by the court and an evaluator. In *Ferguson*, there was no "neutral" expert¹⁹⁴ and no interviews with contacts, while in *Barton*, there was no "lengthy" interview of the volunteer with a neutral evaluator at all, let alone with his contacts.¹⁹⁵ However, Ohio did meet the second prong of this recommendation because in both cases, the volunteers had ample opportunity to address the courts.

Ohio did not meet the final required baseline procedure of holding an independent competency hearing in the trial court. In neither *Ferguson* nor *Barton* did the courts hold separate hearings specifically evaluating the inmates to determine whether they met the standard of competency

188. *State v. Ferguson*, 844 N.E.2d 806, 813 (Ohio 2006).

189. *State v. Barton*, 844 N.E.2d 307, 317 (Ohio 2006).

190. *See supra* text accompanying notes 127-28.

191. *See supra* notes 160-62 and accompanying text.

192. *See discussion supra* Part I.D.3.

193. *See supra* text accompanying note 128.

194. *See State v. Ferguson*, 844 N.E.2d 806, 815 (Ohio 2006) (reporting that the court-appointed state psychologist interviewed Ferguson for nine-and-a-half hours over five days).

195. *See State v. Barton*, 844 N.E.2d 307, 317 (Ohio 2006) (referencing an interview with a defense-retained psychologist, but not a neutral evaluator); *see supra* text accompanying note 128.

to waive.¹⁹⁶ In Ohio, if a defendant had been evaluated during earlier stages in the case, or if no “indicia of incompetency” were shown, there is no subsequent requirement to hold a hearing to determine competency to waive.¹⁹⁷ Therefore, Ohio failed to meet the fifth recommended procedure.

4. South Carolina

In *Downs*, although the court appointed two of the evaluators, the court specifically referred to them as “State experts,” and they testified for the State.¹⁹⁸ Since there was no indication of neutrality in these psychologists, arguably South Carolina did not meet the first proposed requirement in this case.

The South Carolina Supreme Court noted in *Downs* that the state experts “administered several psychological tests” during the second of two meetings to determine his competency to waive under the *Singleton* standard.¹⁹⁹ In fact, the experts administered four psychological tests and, based on the results, concluded that Downs showed no evidence of major psychiatric or cognitive dysfunction.²⁰⁰ Although these psychological tests were not conducted by “neutral” evaluators, and there were no intellectual tests administered, the psychiatric evaluation reports were sufficient to meet the second procedural requirement.

Regarding the third requirement, the experts’ reports indicated that several sources of information were consulted in the competency-to-waive evaluation, including correctional facility records, appellate transcripts, and reports and transcripts from previous competency evaluations.²⁰¹ Therefore, South Carolina met this requirement.

196. See *Ferguson*, 844 N.E.2d at 813; *Barton*, 844 N.E.2d at 316.

197. See *Barton*, 844 N.E.2d at 316 (citation omitted).

198. See *State v. Downs*, 631 S.E.2d 79, 82, 85 (S.C. 2006).

199. *Id.* at 81-82 (noting that both State experts evaluated Downs under the *Singleton* standard and found him competent under both the cognitive and assistance prongs of the test).

200. E.g., Pamela M. Crawford & Jeffrey E. Musick, *Psychiatric Evaluation of William Ernest Downs, Jr.* at 2 (Feb. 23, 2005) (on file with author) [hereinafter *Psychiatric Evaluation*]. The report states:

Mr. Downs was given four psychological tests; the Test of Memory Malinger; the Wechsler Abbreviated Scale of Intelligence (WASI); the Repeatable Battery for the Assessment of Neuropsychological Status; and the Personality Assessment Inventory (PAI). Based on the testing performed there is no evidence of a major psychiatric impairment at this time. There is also no evidence of [f] significant deficits in cognition and [sic] overall intellectual functioning.

Id.

201. *Psychiatric Evaluation*, *supra* note 200, at 1 (stating that the sources of information for the report included the court order mending the competency evaluation,

Transcripts of the evidentiary hearings as well as the psychiatric opinions illustrate that the State met the fourth requirement because Downs had the opportunity to answer questions and make a prolonged statement to the court about his competency and desire to go forward with execution.²⁰² Additionally, the trial court met the fifth recommended procedure by holding not one but two evidentiary hearings, which were both reviewed by the South Carolina Supreme Court.²⁰³

III. THE STATES' IMPLEMENTATION OF THE COMPETENCY-TO-WAIVE STANDARDS CREATES A GREATER LIKELIHOOD THAT INCOMPETENT INMATES ARE STILL BEING EXECUTED

Certain states, such as South Carolina, may implement adequate procedures to determine an inmate's competency to waive post-conviction relief. However, the lack of explicit nationwide regulations delineating the steps required in making competency determinations makes it unlikely that adequate procedures will be followed in every case. Montana's procedures to determine competency to waive post-conviction review are seemingly adequate, but it is important to note that the *Dawson* case was the first case in which the Montana Supreme Court addressed the issue of a competency-to-waive standard.²⁰⁴ The Montana Supreme Court simply remanded the case with instructions to the lower court to employ certain procedures it decided were sufficient to ensure a correct determination *in this case*.²⁰⁵ There is no indication that the Montana courts will hold future cases to the same standards and requirements or if the Montana Supreme Court will adopt specific procedures in the future. The different procedures undertaken in the two previously discussed Ohio cases illustrate the discrepancies in

the appellate transcript in Downs' case, prison records, records from a psychiatric institute, the result of psychological testing conducted on February 17, 2005, and "[c]linical forensic interviews" with Downs conducted on February 11 and 17, 2005). The supplemental materials included previous psychological reports which were based on letters written by Downs, statements of Downs' family and friends, police reports, court records, and other psychological testing of Downs. *Id.* at supplement; *see also supra* note 200 (describing specific tests performed by psychiatrists that the court relied upon).

202. *See* March 2005 Competency Hearing, *supra* note 152, at 8, 271, 273-74. The court acknowledged the testimony of the experts, attorneys, and Downs, noted that Downs' testimony indicated that his motivations were not suicidal, and then concluded that Downs was, "in fact, competent and that he's met the test of *Singleton*." *Id.* at 276 ("It's not so much that Mr. Downs is saying, I want to die; he's saying I don't want to spend the rest of my life locked up.").

203. *See supra* notes 147-54 and accompanying text.

204. *See supra* text accompanying notes 74-76.

205. *See State v. Dawson*, 133 P.3d 236, 249 (Mont. 2006).

implementation that will occur without specific, required procedures to determine competency.²⁰⁶

The state standards discussed above do not exemplify sufficient procedures. Several states do not even implement, let alone require, specific procedures such as allowing the defense attorney the opportunity to cross-examine the state psychiatric evaluators and requiring minimal time frames to evaluate the inmates.²⁰⁷ This is unacceptable in death penalty cases, because they exact the most severe punishment.²⁰⁸ Given that death penalty cases are different based on the severity of the punishment, it is imperative that an evidentiary hearing to determine competency to waive post-conviction appeals be held separate and apart from the evidentiary hearings held to determine the mental capability of defendants to waive jury trials, mitigating evidence, or counsel.²⁰⁹ One argument against this safeguard, which does not hold up to scrutiny, is that the procedure would be an unnecessary expenditure of judicial, state, and defense resources.²¹⁰ States spend millions of dollars each year on death-row inmates' appeals, housing, and other important issues.²¹¹ If

206. See discussion *supra* Part II.B.3.

207. See discussion *supra* Part II.B.

208. See *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (5-4 decision) ("Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (citations omitted)).

209. See *supra* text accompanying notes 172-74 and accompanying text.

210. See *supra* note 21.

211. See DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 4 (2007), <http://www.deathpenaltyinfo.org/FactSheet.pdf> (stating financial facts about the death penalty). The Death Penalty Information Center's pamphlet illustrates the extreme total costs of the death penalty:

- The California death penalty system costs taxpayers \$114 million per year beyond the costs of keeping convicts locked up for life. Taxpayers have paid more than \$250 million for each of the state's executions.
- In Kansas, the costs of capital cases are 70% more expensive than comparable non-capital cases, including the costs of incarceration.
- In Indiana, the total costs of the death penalty exceed the complete costs of life without parole sentences by about 38%, assuming that 20% of death sentences are overturned and reduced to life.
- The most comprehensive study in the country found that the death penalty costs North Carolina \$2.16 million per execution *over* the costs of sentencing murderers to life imprisonment. The majority of those costs occur at the trial level.
- Enforcing the death penalty costs Florida \$51 million a year above what it would cost to punish all first-degree murderers with life in prison without parole. Based on the 44 executions Florida had carried out since 1976, that amounts to a cost of \$24 million for each execution.

a state compares the costs of accepting a waiver and executing a possibly incompetent or insane inmate, it will find that it would be more costly to execute, than to ensure a mistake in competency is not made.²¹² However, the cost is irrelevant because the Constitution requires that states cannot execute incompetent or insane inmates.²¹³

Without uniform and explicit procedures to determine competency to waive, courts can arbitrarily choose which cases need competency hearings without any foundation to support the decision.²¹⁴ Without holding any evidentiary hearing, courts will not have any information regarding the inmate's psychological or intelligence history or other background information necessary to determine whether further competency testing should be held. This process could increase the chance that courts will decide to execute incompetent inmates. The procedural safeguards vary too much to guarantee that in all four states, the next volunteer will not be executed if he or she is incompetent.²¹⁵ As seen in the case studies discussed in this Comment, twenty years after the Supreme Court explicitly decided that it is unconstitutional to execute the incompetent,²¹⁶ there remain serious gaps in state procedures. Therefore, explicitly required standards which specifically articulate the required procedures are necessary.

IV. CONCLUSION

While the states examined in this Comment are doing a more thorough evaluation of a volunteer's competency to waive his post-conviction appeals, the lack of uniform, specific procedures creates the possibility that a mentally ill or suicidal inmate could be executed under the procedures of one state but not another, despite Constitutional requirements. Courts should have to adhere to detailed and uniform requirements in competency evaluations, like those proposed in Part II, prior to discontinuing the appeals and executing the condemned. Regardless of additional safeguards in place, after a determination of competency to waive is made, states should be required to uphold the constitutional prohibition against executing the incompetent at every

• In Texas, a death penalty case costs an average of \$2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years.

Id. (citations omitted).

212. *See id.*

213. *See supra* text accompanying note 8.

214. *See supra* notes 72-73 and accompanying text.

215. *See supra* Part I.C.

216. *See Ford v. Wainwright*, 477 U.S. 399 (1986); *see also supra* notes 8-12 and accompanying text.

possible level. This requires death penalty states to uniformly adopt minimum procedures to ensure that incompetent inmates are not being executed.